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No. 91-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALASKA AIRLINES, INC. AND
TRANSTAR AIRLINES CORPORATION,
Petitioners,

v.

UNITED AIR LINES, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF RESPONDENT UNITED AIR LINES, INC., IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does the owner of an innovative computer facility, which provides valuable services both to the owner's business and to competitors, violate Section 2 of the Sherman Act by charging its competitors (including plaintiffs) a service fee, even though plaintiffs have not offered to prove that the fee has adversely affected competition?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties. United Air Lines, Inc., is a wholly-owned subsidiary of UAL, Inc.

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BRIEF OF RESPONDENT UNITED AIR LINES, INC., IN OPPOSITION

Respondent United Air Lines, Inc. (hereinafter "United") respectfully opposes the petition for a writ of certiorari. Although the petition characterizes the case as an opportunity for this Court to endorse two antitrust "doctrines" that allegedly arise under §2 of the Sherman Act (the "essential facilities doctrine" and "the monopoly leveraging doctrine"), for a series of reasons the case is not a proper vehicle for a decision as to the validity or scope of either doctrine: not only did petitioners fail to offer proof sufficient to state a claim under the legal theories they themselves espouse, but further prosecution of the claims is now blocked by procedural obstacles. Thus even if certiorari were granted, the Court would not be in a

position to resolve the issues the petition seeks to present.

STATEMENT OF THE CASE

Petitioners, plaintiffs below, advanced two independent, alternative antitrust theories in the trial court. First, they alleged that United had lawfully established an "essential facility" (thereby acquiring lawful "monopoly power") but had violated the so-called "essential facilities doctrine" by charging petitioners a fee for access to the facility. Petitioners' alternative "fallback claim" (as they called it) was that the facility and the resulting "power" had been illegally established through unlawful contracting practices and that the access fees therefore represented unlawful monopoly prices.

The district court granted summary judgment against the first claim on the ground that the proffered proof failed to make a case under §2 of the Sherman Act. Petitioners then went to trial on the "fallback claim." After three months of trial the jury returned a verdict for United, finding specifically that United did not enjoy the "monopoly power" alleged. On appeal petitioners did not challenge the jury verdict; they challenged only the district court's summary judgment rulings, which the Ninth Circuit unanimously affirmed.

Factual Background

1. In 1976 United developed a new computerized reservation system or "CRS" (named "Apollo") which revolutionized the process by which travel agents make reservations on and write tickets for airlines. As petitioners emphasized below, "the efficiency of

the travel agency distribution system was dramatically improved" by Apollo and the other four CRS's subsequently developed and owned by other airlines (including American Airlines and Northwest Airlines); for participating airlines these systems generated tremendous volumes of automated "bookings" at a substantially lower cost-per-booking. Pet'rs' Sum. Jud. Br. at 14.

2. In Apollo's early days, as United was learning the CRS business, it provided CRS booking services to other airlines without charge, but as escalating costs made it necessary to develop revenue to finance Apollo's operations, United started to charge "booking fees." Initially contractual arrangements were made with a few airlines for a few cents per booking; as later arrangements were negotiated, higher fees were charged; and, as a result of this gradual historical evolution, by 1984 United was receiving varying Apollo "booking fees" from different airlines. In 1984, however, the Civil Aeronautics Board issued new "CRS regulations" governing the five CRS systems then in the field, and those regulations required, among other things, that every CRS vendor charge uniform prices to all participating carriers. *See* 14 C.F.R. §255.5(a) (1991). Thereupon United started charging all participating airlines a uniform booking fee of $1.85 per booking (lowering the fees for some airlines and raising them for others), an amount substantially below the non-CRS booking cost. Apollo's fee levels have never been challenged as violating the CRS regulations.

3. No airline has ever been refused access to Apollo; every airline that has wanted to participate in the system and that was willing to pay the booking fee

has been allowed to do so. At least one major airline decided that the CRS service was not worth the cost and has foregone CRS participation in favor of other distribution techniques. Specifically, Southwest Airlines, the only major airline to have been continuously profitable throughout the relevant period, has eschewed participation in Apollo and has grown steadily over the years.[1] The continued success of Southwest, now the parent of petitioner TranStar, makes clear that a strong competitive position can be maintained without participation in Apollo.

Procedural History

1. In 1984-85 a group of airlines including petitioners filed two separate CRS lawsuits, one against United and the other against American Airlines. (In the same period a separate group of plaintiffs, the so-called "Continental group," filed similar suits relying on somewhat different legal theories.) Today only two of the original plaintiffs remain in the field against United; they are petitioners Alaska Airlines, a successful carrier, and TranStar Airlines Corporation, which withdrew from the airline business many years ago.

2. In the period 1984-87 petitioners and other plaintiffs engaged in a massive discovery program, taking more than 300 depositions and processing millions of documents. Petitioners then elected to present their case on a legal theory that can be summarized as follows: (1) Apollo is capable, petitioners argue, of

[1] RT 11/21/89 at 23-29 (testimony of William J. Baumol). The petition's repeated assertions (at 4, 17) that no airline "could possibly afford" to operate without CRS participation are not reconcilable with the undisputed facts as to Southwest's success.

generating such large amounts of revenue for participating airlines that Apollo has become "an essential facility" to which airlines generally need to have access in order to compete in the airline business, thus conferring upon United lawful "monopoly power" over its airline competitors; (2) since United at one time charged different booking fees to different airlines, and because Apollo generates profits for United, it follows (say petitioners) that the fees they have been charged for access to Apollo have been "unreasonable and discriminatory;" and (3) it further follows, they say, that they should be entitled to recover from United *all* booking fees that they have ever paid to United, times three (for treble damages). Thus in the district court below these petitioners took the position that §2 of the Sherman Act prohibited United from charging any booking fee of any size to any airline.

3. Petitioners have explained their selection of the foregoing theory by saying that they considered it "simpler to prove" than alternative approaches.[2] Since they could afford under this approach to concede the lawfulness of Apollo's position in the CRS market,[3] they hoped to avoid the necessity of proving that United had developed Apollo's position through unlawful conduct.[4] Similarly, on their assumption that every penny of booking fees collected by Apollo was illegally collected and recoverable, petitioners avoided

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[2] *See* Pet'rs' Opening Appellate Br. at 18, n.23.

[3] *Id.* at 2 (United "acquired a lawful monopoly in the market for computerized reservation services . . .").

[4] Because petitioners' current theories do not depend on proof of illegality, the petition's discussion (at 4, 19) of allegedly illegal contracting practices is irrelevant here.

the necessity of assembling proof that the fees were competitively significant or had caused concrete competitive injury.[5] They never offered to show, for example, that if they had not incurred such booking fees, they would have purchased more airplanes or flown on more routes or carried more passengers or enjoyed a larger market share. Their grievance against the booking fees was framed in different terms, referring to price "discrimination" (until 1984) and the notion that "American and United have profitted [sic] handsomely from their exorbitant fees." Pet'rs' Sum. Jud. Br. at 60. The position was that an Apollo booking fee of any size was unlawful and recoverable, whether or not it had a concrete impact on competition.

4. The petition asserts, apparently as a matter of supposed "logic," that if United enjoys the power to charge any booking fee of any size, it necessarily enjoys the power to place competing airlines in "a price squeeze" and thus to "entirely eliminate competition among airlines." Pet. at 16-17, 19. No evidence to that effect was offered below. By the same token, it was conceded below that petitioners were not prepared to prove that United had either actually monopolized the airline business or attempted to do so. *See* App. 17a, 18a; Pet'rs' Opening Appellate Br. at 2; Reply Br. at 2.[6]

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[5] The petition's assertion (at 5) that a CRS practice called "screen bias" (a practice followed by all five CRS's until banned by the CAB in 1984) "diverted sales" from petitioners to United, thus causing competitive injury, is improper; no offer to prove such injury was made by these petitioners below.

[6] The implications in the petition (at 18-19) that petitioners offered to prove that respondents were "monopolizing or at-

5. Upon completion of discovery United moved for summary judgment against all pending claims, including petitioners' "essential facilities" claim and an independent "monopoly leveraging" claim being asserted by the Continental group of plaintiffs. In its motion United pointed out that petitioners "appear now to have abandoned" any monopoly leveraging claim. United's Main Sum. Jud. Br. at 63. Petitioners' 70-page brief in opposition relied exclusively upon their version of the essential facilities doctrine, made no mention of "monopoly leveraging," did not take issue with United's assertion that petitioners had abandoned any monopoly leveraging claim, and did not object to the entry of summary judgment against the latter. As noted *infra*, it is United's position that petitioners are now precluded from pursuing any monopoly leveraging claim here.[7]

6. The district court summarily dismissed petitioners' essential facilities claim on the basic ground that the essential facilities doctrine, rather than providing a basis for liability independent of §2, requires a showing of actual or attempted monopolization (here, of the air transportation market) and that petitioners had failed to offer such proof. App.

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tempting to monopolize the [air transportation] market" and that they enjoyed "the power to entirely eliminate competition among airlines" is inconsistent with petitioners' concessions below that they were not prepared to do so.

[7] In a footnote (App. 18a, n.15) the court of appeals asserted in effect that petitioners did not abandon or waive any monopoly leveraging theory, but, if certiorari is granted, United will demonstrate from the record that that factual conclusion is clearly erroneous. The court was demonstrably incorrect, for example, in asserting that petitioners' summary judgment brief "mentioned the monopoly leveraging doctrine." It did not.

37a-40a. For similar reasons the district court simultaneously rejected the Continental plaintiffs' monopoly leveraging claim. App. 70a.

7. Shorn of their essential facilities theory in the district court, petitioners elected to go to trial on their "fallback claim"—*i.e.*, that by the early 1980's Apollo had achieved "monopoly power" in the CRS business through improper contracting practices and that, when United then charged booking fees, it was exercising illegally-created-and-maintained monopoly power to extract unlawfully high monopoly prices. Pet'rs' Opening Appellate Br. at 19. After a full three-month jury trial,[8] the verdict was simply that United (and American) did not enjoy the monopoly power alleged. From that verdict petitioners did not appeal. Their post-trial appellate challenge was directed solely to the district court's pretrial summary judgment rulings, which were then affirmed by the court of appeals. App. 6a *et seq.*

8. In the court of appeals United argued *inter alia* that, because the jury had decided that United lacked the monopoly power that was the factual predicate of petitioners' essential facilities theory (as well as the predicate of the monopoly leveraging theory pressed by the Continental plaintiffs), petitioners were estopped by that unchallenged verdict from further proceeding with either their essential facilities theory or a monopoly leveraging theory. Although the court of appeals rejected the estoppel argument (App. 5a-6a), United adheres to its position.

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[8] Although petitioners had brought separate cases against United and American Airlines—and although the two lawsuits remain separate—the two were tried together (over United's objection) before a single jury.

REASONS FOR DENYING THE WRIT

Preliminarily, although petitioners imply that conditions in the relevant markets are "anticompetitive and harmful to consumers" and thus of vital current importance (Pet. at 2), the suggestion overlooks the fact that the practices of all CRS operators have been under continuous regulation by the CAB and its successor, the Department of Transportation, for the past seven years, thus providing the interests of competitors and consumers with all the protection that the regulators regard as appropriate. This is simply not a situation in which judicial intervention is needed to remedy on-going ills.

A. ESSENTIAL FACILITIES

1. Since the Result Reached Below Is Consistent with the "Essential Facilities" Decisions upon Which Petitioners Rely, There Is No Conflict with the Case Law in Other Circuits

The petition cites a total of seven "essential facilities cases" with which the holdings below are said to be in "clear conflict." Pet. at 10-12. The reasoning of the cited cases refutes the argument.

At the outset, there seems to be general basic agreement as to the "conventional" scope and content of the essential facilities doctrine as developed in the lower federal courts. In April 1991, when certiorari was sought in the *Conrail* case, *Delaware & Hudson Ry. Co.* v. *Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), *cert. denied*, ___ U.S. ___ , 111 S. Ct. 2041, 114 L. Ed. 2d 125 (1991), this Court asked the Solicitor General for the Government's views, and the Solicitor General observed that a "four factor test is

conventionally applied" in determining whether the essential facilities doctrine gives rise to §2 liability:

> "(1) [C]ontrol of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."[9]

The quotation comes from *MCI Communications* v. *American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-1133 (7th Cir.) (citations omitted), *cert. denied*, 464 U.S. 891 (1983), and it is worth noting that in the district court below petitioners' extensive brief in opposition to United's summary judgment motion relied heavily on (and indeed was structured around) exactly the same *MCI* factors. Pet'rs' Sum. Jud. Br. at 30; *see also* Pet'rs' Opening Appellate Br. at 27-28 and Reply Br. at 8, 13, and 14.

Petitioners' reliance upon the foregoing factors, including particularly factor (3), has plagued their position from the outset because it is factually undisputed that, so far as Apollo is concerned, there has never been any "denial of the use of the facility to a competitor." Moreover, turning to the seven essential facilities cases allegedly creating a "conflict," liability was found in only three,[10] and in each of the three the critical factor was an outright refusal to

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[9] "Brief for the United States as Amicus Curiae" in Consolidated Rail Corporation v. Delaware & Hudson Ry. Co., No. 90-380, October Term 1990 (cited hereinafter as the "*Conrail* brief") at 15, n.21.

[10] The three cases are (1) *Hecht* (Pet. at 10), (2) *Fishman* (*id.* at 11), and (3) *Otter Tail* (*id.* at 14).

deal on the part of the facility owner.[11] For example, the petition relies heavily upon this Court's decision in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), characterizing it (at 14) as an essential facilities case, but the "critical events" in that case were the defendant's flat refusals to deal. *See id.* at 371, 378. In short, the very cases upon which petitioners here rely establish that, if the outcome of this case is to be controlled by "conventional" doctrine, petitioners have no cause of action.

The same reasoning was employed by the court of appeals below. In concluding that petitioners had failed to state an essential facilities claim, the court referred directly to the four *MCI* factors quoted above and emphasized that, whereas an outright refusal to deal can give rise to liability, there had been no such refusal in this case:

> "Moreover, United and American have never refused any of the plaintiffs access to their respective CRSs. *See Otter Tail*, 410 U.S. at 378, 93 S. Ct. at 1030 (outright refusal); *MCI*, 708 F.2d at 1132 (same). Rather, United and American have always given all of their competitors in the air transportation

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[11] In one of the essential facilities case cited by petitioners, the *Conrail* case cited *supra* at 9, the Court of Appeals for the Second Circuit reversed summary judgment in favor of the defendant on the ground that an allegation that the facility owner had instituted a huge increase in the access fee (an increase that the plaintiff refused to accept) for the purpose of achieving a monopoly was sufficient to state a claim. Since the court evidently considered the alleged conduct to be tantamount to a refusal to deal, *Conrail* seems consistent with the other cases upon which petitioners rely.

> market such access for a fee. Neither United nor American have ever set this fee at a level that would drive their competitors away." App. 16a (footnote omitted).

Given the undisputed facts thus recited, the "conventional" principles to which petitioners themselves subscribe plainly called for rejection of petitioners' claim. Since the court of appeals thus acted in conformity with the teachings of petitioners' essential facilities authorities, the petition's suggested "conflict" simply does not exist. Although the court below also observed that petitioners had "concede[d]" that United was neither monopolizing nor attempting to monopolize "the downstream air transportation market" (*see* App. 17a-18a), thus fortifying the court's conclusion that United's conduct was "not actionable under Section 2" (*id.*), the latter observation was not essential to the court's decision to reject petitioners' essential facilities claim.[12]

Finally, note must be taken of the petition's reference to cases holding or implying that the essential facilities doctrine prohibits "anticompetitive behavior" that imposes a "severe handicap" upon the facility owner's competitors. Pet. at 10-12. The cases are without significance here for two reasons. First, the

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[12] Since the results reached in the essential facilities cases upon which petitioners rely are consistent with the dictum of the court of appeals, there is in fact no conflict between the positions, but even if there were a conflict, it would not militate in favor of certiorari: as noted in the classic treatise on this Court's practice, a mere inconsistency between dicta below and holdings elsewhere should not be considered "a real or 'intolerable' conflict" sufficient to warrant certiorari. Robert L. Stern, et al., *Supreme Court Practice* 196 (6th ed. 1986).

cited cases (particularly *Hecht* and *Twin Laboratories*) make clear that it is only where the "severe handicap" was the result of an outright refusal to deal (or "denial of access") that liability has been found; the language of the cases is perfectly explicit on the point.[13] Secondly, even if the case law could be read as prohibiting some other kind of severely handicapping or harmful conduct on the part of a facility owner, petitioners' essential facility claim would have to be rejected for failure to prove (or offer to prove) the existence of any kind of "severe handicap" within the ordinary meaning of that phrase.[14] As the *Twin Laboratories* opinion observed,

> "The existence of a facility, even if essential in a technical sense, does not constitute an antitrust violation if the plaintiff cannot allege harm to competition." 900 F.2d at 568.

Since petitioners never offered proof of a concrete handicap or harm to competition, the result reached below is completely consistent with the authorities upon which petitioners rely.

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[13] See Petition at 10, 11, quoting from *Hecht* (referring to a "denial of [the facility's] use inflict[ing] a severe handicap on potential market entrants") and from *Twin Laboratories* (same).

[14] To the extent that petitioners are concerned about a future "price squeeze" to "eliminate competition" (Pet. at 16-17), the answer is that petitioners have conceded (as noted by the court of appeals below) the absence of any dangerous probability that United will monopolize the airline business. App. 17a-18a.

2. The Courts Below Were Correct in Their View That an "Essential Facilities" Claimant Under §2 of the Sherman Act Must Offer To Prove Either Actual or Threatened Monopolization

Ignoring the fact that they have failed factually to state a case under the conventional essential facilities doctrine, petitioners contend that the courts below erred in their view that under that doctrine there can be no violation of the law (*i.e.*, of §2 of the Sherman Act) unless the facility owner used his facility "actually to monopolize or attempt to monopolize." Pet. at 10. In arguing for "less stringent tests," *id.*, petitioners are in effect contending that there can be antitrust liability even though the conduct involved does not violate the explicit proscriptions of §2.

The clarity of the error in petitioners' contention militates against a grant of certiorari. Insofar as unilateral conduct is concerned, the plain words of §2 compel the conclusion that either actual or attempted monopolization is a prerequisite to liability—a proposition made completely clear in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767-68, 775-76 (1984). Moreover, the antitrust authorities of the U.S. Government disagree with petitioners' suggestion. In the 1991 *Conrail* brief cited above the Solicitor General and the Assistant Attorney General in charge of the Antitrust Division pointed out that "[t]he 'essential facility' doctrine simply describes one form of conduct that may, in some circumstances, constitute monopolization or attempted monopolization" and flatly "disagree[d]" with the suggestion that the doctrine can give rise to liability in the absence of those basic §2 requirements.[15] In view of the clarity

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[15] *See Conrail* brief, *supra* n.9, at 16. In the same brief the

of the *Copperweld* opinion on the point, there is no need for the Court to revisit the subject now—particularly in a case where, as here, petitioners cannot even plead a denial of access of the kind required under even the most expansive view of the essential facilities doctrine.

B. MONOPOLY LEVERAGING

As previously noted, it was petitioners' position below that under the essential facilities doctrine the charging of *any* booking fee was illegal without regard to its competitive significance or insignificance. Apparently petitioners regarded this simple approach as obviating the need to invoke the "monopoly leveraging" theory, which would have required at least an affirmative showing that the Apollo booking fees placed them at a significant "competitive disadvantage." It is United's position here (a) that petitioners, thus motivated, clearly abandoned any monopoly leveraging claim and should not be given an opportunity to argue such a claim on the merits here, and (b) that even if no such abandonment had taken place, this record presents no monopoly leveraging issue deserving of certiorari review.

Government made clear its view that the essential facilities doctrine does not prohibit a facility owner from charging an access fee, even though it is a monopoly price, and thus transferring some amount of profit from the user to the owner ("it is not an antitrust offense for a lawful monopolist to charge a monopoly price") because any such prohibition "would reduce incentives to investment and innovation by siphoning off the rewards normally accruing to desirable behavior." *Id.* at 14, 16.

1. The "Monopoly Leveraging" Rulings Below Do Not Conflict with Any Cognizable Body of Law in Any Other Circuit

In the court of appeals below petitioners invoked the Second Circuit's 13-year old decision in *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), the first case to postulate the "monopoly leveraging" concept that where a defendant enjoying lawful monopoly power in Market A uses that power to gain "a competitive advantage" in Market B, it may be liable under §2 even though (1) the monopoly position is concededly lawful and (2) there has been no actual or threatened monopolization of the second market.[16] Having decided to allow petitioners to argue such a claim, the court of appeals "reject[ed] *Berkey's* monopoly leveraging doctrine as an independent theory of liability under Section 2" (App. 19a), thus creating an apparent conflict. The post-*Berkey* history, however, raises grave doubts as to whether the "doctrine" enjoys any continuing vitality. In such circumstances, United respectfully submits, the wisest course is to deny certiorari and wait to see whether a real "conflict" ever develops.

As to whether *Berkey* should be regarded as good law today, the D.C. Circuit has noted that in the early post-*Berkey* years the decision attracted considerable criticism. *Association for Intercollegiate Athletics for Women* v. *N.C.A.A.*, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984). Also in 1984 this Court handed down its *Copperweld* decision making amply clear that, con-

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[16] In the summary judgment proceedings below petitioners never mentioned *Berkey*.

trary to *Berkey*, §2 liability cannot be found in the absence of either actual or attempted monopolization. Finally, in 1990 the Second Circuit itself went out of its way to characterize the *Berkey* monopoly leveraging theory as dictum. *Twin Labs., Inc.* v. *Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990) (cited in the Petition at 11).

Moreover, although a "monopoly leveraging" approach would seem to have considerable attraction for treble damage plaintiffs (since it is presumably easier to establish "a competitive advantage" than actual or attempted monopolization), we are unaware of any post-*Berkey* case, either in the Second Circuit or elsewhere, that has actually imposed liability and damages on the basis of the *Berkey* rationale (*i.e.*, in the absence of any showing of actual or threatened monopolization of the second market). The petition (at 9) suggests that there are cases "following" *Berkey*, but in fact even the judicial decisions cited therein did not impose liability on that basis.

For example, in *Grand Light & Supply Co.* v. *Honeywell, Inc.*, 771 F.2d 672, 681 (2d Cir. 1985), a case characterized in the petition as "reaffirm[ing]" *Berkey* (Pet. at 9), the Second Circuit simply recited that the plaintiff in that case had invoked the *Berkey* theory but had failed to establish that the defendant enjoyed any "competitive advantage," leading to a simple affirmance of the district court's holding that there had been no violation of the federal antitrust laws. In the circumstances there was no need to consider the vitality of the *Berkey* reasoning.

In *Kerasotes Mich. Theatres* v. *National Amusements, Inc.*, 854 F.2d 135 (6th Cir. 1988), *cert. dismissed sub. nom. G.K.C. Michigan Theatres, Inc.* v.

National Amusements, Inc., 490 U.S. 1087 (1989), the plaintiff alleged that the defendant had used monopoly power in Market A either to monopolize or to attempt to monopolize Market B.[17] The defendant moved to dismiss under Rule 12(b)(6) for failure to state a claim; the district court granted the motion; and the Court of Appeals for the Sixth Circuit reversed, holding (as quoted in the petition at 9-10) that the plaintiff had stated a claim even though the defendant had not achieved "monopoly power or [a] dominant market position in that second market." As subsequently observed by the same court, the critical allegation in *Kerasotes* was the allegation that the defendant had sought to exclude competition. *Arthur S. Langenderfer, Inc.* v. *S.E. Johnson Co.*, 917 F.2d 1413, 1426 (6th Cir. 1990), *cert. denied*, __U.S.__, 112 S. Ct. 51, 274, 116 L. Ed. 2d 29, 226 (1991). Thus the *Kerasotes* court's reinstatement of the plaintiff's claim was completely consistent with the view of the courts below that, where a plaintiff alleges and offers to prove an attempt to monopolize "the second market," he is entitled to proceed under §2 of the Sherman Act.

United acknowledges, of course, that the court of appeals read *Kerasotes* more broadly than we do and expressed the view that the decision is "in error" (App. 19a, n.16), thus giving rise to another apparent conflict. In view of *Langenderfer's* reading of *Kerasotes*, however, the Ninth Circuit in this case was expressing disagreement with a *Kerasotes* dictum

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[17] Although the allegation of attempted monopolization is not clearly reflected in the Sixth Circuit's opinion, it was included in the Complaint.

which apparently does not reflect the law in the Sixth Circuit. Thus no true conflict is involved.

In any event, this Court's authoritative reasoning in *Copperweld* and the Second Circuit's characterization of the *Berkey* approach as dictum (coupled with the apparent absence of cases imposing liability and damages on such a theory) raise substantial doubt that the *Berkey* theory will be treated as authoritative in the future. Until it is so treated, we submit, certiorari review would not be worth undertaking.

2. The Decisions Below Do Not Conflict with the Cited Decisions of This Court

In challenging the "monopoly leveraging" holding below the petition advances the entirely novel thesis that the antitrust laws employ two "different" "monopolization standards"—(1) the familiar standard set forth in §2, calling for proof of either actual or threatened monopolization, and (2) the different and lower "monopolization standard" allegedly articulated in *United States* v. *Griffith*, 334 U.S. 100, 107 (1948), which cryptically referred to gaining "a competitive advantage." The suggestion is that in a two-market situation only the lower "*Griffith* standard" is "appropriate to the circumstances" and that in applying §2's "higher standard" here, the courts below acted inconsistently with *Griffith*. Pet. at 14-15.[18]

The short answer is that such an expansive reading of a single phrase from *Griffith* (in which the only

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[18] As part of its discussion of *Griffith* the petition also implies (at 14) some conflict with this Court's decision in *Otter Tail*, which it characterizes as an essential facilities case. As indicated above, however, since there was an outright refusal to deal in *Otter Tail*, there is no conflict here.

conduct actually condemned was concerted action of a kind bearing no relationship to the present case) is inconsistent with both the plain meaning of the words of §2 and this Court's thoughtful analysis of §2's role in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767, 775-76, 767-68 (1984). At least since *Copperweld* it has been generally understood that a single firm can be liable under §2 only where there is a showing of actual or threatened monopolization, and that understanding obviates the need for further elucidation of that principle now.[19]

3. Because Petitioners Did Not Offer To Prove a "Competitive Advantage," this Case Is Not the Appropriate Vehicle for Resolving the Validity of the Monopoly Leveraging Theory

The Government's 1991 *Conrail* brief refers to the "salutary principle" reflected in *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), that "antitrust defendants should not be subjected to the formidable burdens and risks of trial on the basis

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[19] *See, e.g.*, Drinkwine v. Federated Publications, Inc., 780 F.2d 735, 740 (9th Cir. 1985), *cert. denied*, 475 U.S. 1087 (1986) (quoting *Copperweld* for the proposition that "the conduct of a single firm is governed by §2 alone and is unlawful only when it threatens actual monopolization"); Indiana Grocery, Inc. v. Super Valu Stores, 864 F.2d 1409, 1413 (7th Cir. 1989) ("Section 2 of the Sherman Act governs single-firm conduct only when it threatens actual monopolization"); Nurse Midwifery Assocs. v. Hibbett, 918 F.2d 605, 611-12 (6th Cir. 1990) (citing *Copperweld* for the proposition that "[u]nilateral conduct is governed by section 2 of the Sherman Act, . . . 'and is unlawful only when it threatens actual monopolization'"), *modified*, 927 F.2d 904, *cert. denied*, ___ U.S. ___, 112 S. Ct. 406, 116 L. Ed. 2d 355 (1991); Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1422 (6th Cir. 1990) (same), *cert. denied*, ___ U.S. ___, 112 S. Ct. 51, 274, 116 L. Ed. 2d 29, 226 (1991).

of evidence that is insufficient to support a viable theory of antitrust liability." *Conrail* brief at 19. In this case petitioners' "evidence" is plainly insufficient to support a monopoly leveraging claim (even supposing that the *Berkey* principle is valid): petitioners simply did not offer to prove that Apollo's booking fees conferred any concrete, significant "competitive advantage" upon United vis-a-vis its competitors. That being so, United submits, a grant of certiorari could only lead to an affirmance, whatever the Court's view of the validity or invalidity of the monopoly leveraging theory. In short, the case does not present a suitable vehicle to decide that issue.

Moreover, even if it were possible to find some factual basis for concluding that Apollo's booking fees created a significant "competitive advantage" for United in the "downstream" air transportation market, the Court would not necessarily be in a position to decide the validity of the *Berkey* theory. This is because the "upstream market" context here is so different from that in *Berkey*. There the defendant was the sole firm in the "upstream market," enjoying classical monopoly power, whereas in this case the corresponding market (CRS) has been occupied by five different firms, all engaged in vigorous competition with one another. Whatever market power United may have enjoyed as a CRS market competitor, it was qualitatively different from the overall monopoly power enjoyed by the *Berkey* defendant as the sole "upstream market" participant. If this Court, having granted certiorari, were to decide that United's supposed "competitive advantage" did not violate §2 (because there was no actual or threatened monopolization), such a holding would leave open the

question whether a similar competitive advantage in the hands of a *Berkey*-type monopolist would violate the Act. Again, this case does not present a good vehicle for resolving the validity of the *Berkey* theory.

C. THE ALLEGED DEPRIVATION OF PETITIONERS' "RIGHT TO TRIAL"

The final four pages of the petition (16-19) suggest that the courts below improperly resolved certain "fact issues" against petitioners and thus "deprived [them] of their right to trial." Pet. at 16. Such fact-bound issues, of course, do not normally warrant review by this Court. In any event, the petition's discussion reflects at least some forgetfulness as to the positions taken by petitioners below.

(a) The petition implies (at 17) that in the courts below petitioners offered to prove that United, through Apollo, enjoyed the power to "eliminate competition in the air transportation market," but an offer of proof to that effect appears in none of the three relevant briefs filed in the courts below. Indeed, as previously explained, in the court below petitioners were proceeding on a theory designed to eliminate the difficulties of making such a case.

(b) Representing that it is "undisputed" that "no airline has [ever] withdrawn from any CRS," the petition asserts (at 17) that, if petitioners had been given the opportunity, their "evidence at trial would have shown . . . that withdrawal" from Apollo "would swiftly have destroyed any airline that tried it." In fact the existing record shows exactly the opposite.[20]

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[20] It is undisputed that Southwest Airlines "tried it" with great success.

Moreover, such "evidence" would not have established liability even under the case law upon which petitioners themselves rely, because petitioners did not offer to prove a refusal to deal, a "severe handicap," or a concrete "competitive advantage" resulting from Apollo's booking fees.

(c) The petition's complaints (at 18) about United's CRS contracting practices are irrelevant under both of the legal theories advanced here, both of which assume that United's position in the CRS market was achieved and maintained lawfully. *See supra* p. 5 and n.4.

(d) The petition asserts that the courts below "simply assum[ed]" that United "could not be monopolizing or attempting to monopolize the market," whereas (says the petition) "[p]etitioners came forward with evidence . . . that [United] had the power to eliminate competition among airlines." *Id.* at 19. The latter assertion is not only a misstatement of the record; it ignores petitioners' own concession that they could not show that United is in a position (or has attempted) to monopolize the airline business. *See supra* p. 6.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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